

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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)
IN THE MATTER OF ACCESS TO REAL)
PROPERTY IN THE VILLAGE OF)
CANAJOHARIE, MONTGOMERY COUNTY,)
NEW YORK OWNED BY:)
)
)
T D DEVELOPMENT INC.,)
)
)
)
Respondent.)
)
)
Proceeding under Section 104(e) of the)
Comprehensive Environmental Response,)
Compensation, and Liability Act of 1980,)
as amended, 42 U.S.C. Section 9604(e).)
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Index No.
CERCLA-02-2017-2003

ADMINISTRATIVE ORDER DIRECTING COMPLIANCE
WITH REQUEST FOR ACCESS

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I. JURISDICTION

1. This Administrative Order ("Order") is issued to T D Development Inc. ("TD Inc." or "Respondent") pursuant to the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9604(e)(5), and Section 300.400(d)(4) of the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR § 300.400(d)(4). This authority was delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923, redelegated to the Regional Administrators of EPA on May 11, 1994, by EPA Delegation No. 14-6, and further delegated to the Director of the Emergency and Remedial Response Division by order dated November 23, 2004.

II. STATEMENT OF PURPOSE

2. This Order requires Respondent to provide EPA and its authorized representatives with entry and access to a parcel of land described more fully below for the purpose of performing a removal action related to the release or threatened release of hazardous substances at the Beechnut Nutrition Corp Superfund Site ("Site") located in the Village of Canajoharie, Montgomery County, New York. This Order further requires Respondent to refrain from interfering with entry and access to the Property by EPA and its authorized representatives for the purposes set forth herein.

III. FINDINGS OF FACT

3. The Site includes property located at 68-102 Church Street in Canajoharie and identified as tax parcel number 63.14-1-9.1 (hereinafter, "Property"). The Property consists of approximately 26.9 acres of land that is bisected by Canajoharie Creek. The Property is bordered by Interstate 90 to the north, residential and business sections of Canajoharie to the south and west, and Interstate 90 entrance and exit ramps to the east. The Property contains many buildings, warehouses, and support structures. The focus of EPA's removal action is on the portion of the Property east of Canajoharie Creek including three former buildings numbered 72, 73, and 74. A map showing the Property is attached as Exhibit A.

4. From 1891 until 2009, the Property was used as a cannery and baby food manufacturing facility by Beech-Nut Nutrition Corp. ("Beech-Nut") or its predecessors.

5. On December 5, 2013, Beech-Nut sold the Property to TD Development, LLC (hereinafter referred to as, "TD LLC"). As part of the sale, the parties contemplated the need to abate asbestos at the Property prior to demolition.

6. Following TD LLC's purchase of the Property, it retained the services of asbestos abatement contractors in efforts to address asbestos, a CERCLA hazardous substance, at the Property prior to demolition.

7. On December 29, 2014, Jeffrey Wendel, the apparent sole shareholder of TD Inc.,

executed a contract of sale to purchase the Property from TD LLC for one dollar. A subsequently recorded deed and property tax records identify TD Inc. as the owner of the Property. However, TD Inc. did not exist as an entity until the filing of formation documents in the State of Ohio on July 14, 2016. On December 28, 2014, TD LLC also assigned a salvage contract, originally between TD LLC and demolition contractor B & B Recycling, LLC ("B&B"), related to the Property to TD Inc.

8. Commencing in December 2014 buildings 72, 73, and 74 were demolished without complete asbestos abatement.

9. EPA conducted a survey of the Property from outside the Property boundary on December 12, 2015 during which the remnants of demolition activities (i.e., large piles of mixed construction debris) were observed outdoors in the area of former buildings 72, 73, and 74. Debris from these piles drifted onto Interstate 90 resulting in the issuance of a citation to B&B by the Village of Canajoharie.

10. On December 23, 2015, EPA contacted Mr. Wendel by telephone regarding access to the Property in order to conduct a Removal Site Evaluation ("RSE"), which would enable EPA to determine eligibility of the Site for a CERCLA removal action. During that conversation, Mr. Wendel informed EPA that asbestos surveys had already been performed at the Property and therefore, he would return to the facility in early 2016, at which time he would consent to EPA inspecting the facility. EPA contacted Mr. Wendel via telephone on January 19, 2016 and again requested access to the property in order to conduct the RSE. Mr. Wendel verbally granted access to the Property for the purposes of the RSE during that same conversation. EPA sent further correspondence to Mr. Wendel on January 19, 2016 and February 12, 2016 seeking unrestricted access to also conduct required actions to address the release or threatened release of hazardous substances. Mr. Wendel did not respond to these requests.

11. The field work for the RSE was conducted on February 23rd and 24th, 2016. In the RSE, EPA determined that asbestos-containing material ("ACM") existed in the outdoor debris piles, walls remaining after demolition that are exposed to the weather, and in two roll-off containers. The RSE documented the presence of friable asbestos at the Property. Breathing lower levels of asbestos can cause changes in the pleural membrane of the lungs through the introduction of blebs (small blisters), or plaques. While, exposure to higher concentrations of asbestos can lead to asbestosis.

12. Subsequent to the RSE, EPA attempted to contact Mr. Wendel again to discuss obtaining access to the Property in order to address the ACM. On July 15, 2016 EPA spoke with Mr. Wendel and he informed EPA that he could not consent to access to the Property because he was no longer a shareholder of TD Inc., having sold TD Inc. to 725 Bank Street Development, Inc. ("Bank Street"). On July 18, 2016, EPA sent correspondence via email and certified mail requesting that Mr. Wendel either consent to access or provide documentation detailing the sale of TD Inc. to Bank Street.

13. Based on documents obtained by EPA, including some provided by Mr. Wendel, Mr. John Ziggas III is apparently the sole shareholder of Bank Street and/or the sole shareholder

of TD Inc., and possesses the authority to either grant or deny EPA access to the Property on behalf of either the owner, TD Inc., or its parent.

14. EPA attempted to contact Mr. Ziggas to obtain consent to access to the Property from TD Inc. or its parent corporation Bank Street. After EPA did not receive any response to a July 26, 2016 letter or a July 28, 2016 email requesting access to the Property, Mr. Ziggas was reached via telephone in early August 2016. Mr. Ziggas would not consent to EPA access to the Property, stating he had sold TD Inc., but could not identify the buyer, and has since failed to provide that identification despite EPA requests. On August 24, 2016, EPA again spoke with Mr. Ziggas by telephone and he again would not grant access to the Property.

15. On September 21, 2016 EPA finalized an Action Memorandum that documented the release or threat of release of asbestos at or from the Property and the need for a CERCLA removal action to abate an imminent and substantial endangerment to human health, welfare, or the environment.

16. The removal action to be conducted by EPA will address the most immediate risks at the Site, including approximately 10,000 tons of masonry block and other debris containing friable asbestos in piles exposed to the elements, which will result in continued releases to the environment should it remain unmitigated. To perform these response actions, it will be necessary for employees, agents, contractors, and other representatives of the EPA to enter the Property. The activities for which entry is required include the following:

- Establishing containment barriers to the extent practicable to limit the migration of asbestos from the Site property;
- Temporary containment and securing of the asbestos debris piles followed by their bulk removal;
- Containment and securing of materials to prevent release from friable asbestos coating located along the exterior of walls which are the subject of this removal action;
- Demolition and disposal of partial walls as necessary;
- Segregation and decontamination of scrap metal for recycling;
- Removal of ACM located in roll-off containers inside the warehouse;
- Return of roll-off containers to owners;
- Provision of necessary air monitoring;
- Off-site disposal of any additional hazardous substances identified during the course of the removal action;

- To the extent necessary, following the removal of asbestos and asbestos contaminated debris, securing remaining buildings to prevent access;
- Off-site disposal of hazardous waste and/or substances in compliance with the EPA Off-Site Rule, 40 CFR § 300.440.

17. EPA estimates that the duration of the required entry and access to complete the removal actions described in Paragraph 16 will be approximately six months, contingent upon available funding.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

18. The Site is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

19. Respondent is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

20. Asbestos is a hazardous substance or pollutant or contaminant within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

21. EPA has a reasonable basis to conclude that there is or may be a release or threat of release of a hazardous substance or pollutant or contaminant into the environment at the Site, as the terms “environment” and “release” are respectively defined in Sections 101(8) and 101(22) of CERCLA, 42 U.S.C. §§ 9601(22) and 9601(8). This conclusion is based upon sampling conducted during the RSE which revealed friable asbestos exposed to the elements in construction debris piles, roll-off containers, and asbestos-coated walls.

22. The property owned by Respondent referred to in Paragraph 3 above is a vessel, facility, establishment, or other place or property:

- a. Where a hazardous substance has been or may have been released;
- b. Where such release is or may be threatened; and
- c. Where entry is needed to effectuate a response action.

23. As discussed above, EPA and its designated representatives require entry to the Property owned by Respondent for the purposes of taking a response action at the Site within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1).

24. EPA has requested that Respondent provide access to the Property for the purposes described in Paragraph 16, above. Respondent has not, to date, granted consent for such access within the meaning of Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5).

V. ORDER

25. Based upon the foregoing Findings of Fact, Conclusions of Law and

Determinations, and the Administrative Record, Respondent is hereby ordered to provide EPA and its officers, employees, agents, contractors, and other designated representatives full and unrestricted access at all reasonable times to the Property for the purpose of undertaking the response activities described in Paragraph 16, above. Respondent shall provide such access to the Property continuously from the effective date of this Order until such time as EPA informs Respondent in writing that the access is no longer needed in connection with the response actions. EPA currently anticipates that this access will be needed until EPA completes all field work associated with the response action, which is anticipated to take approximately six months from the date EPA mobilizes to the Site contingent upon available funding.

26. Respondent shall not interfere with EPA's exercise of its access authorities pursuant to 42 U.S.C. § 9604(e)(3) and 40 C.F.R. § 300.400(d), and shall not interfere with or otherwise limit any activity conducted at the Property pursuant to this Order by EPA, its officers, employees, agents, contractors, or other designated representatives. Any such interference shall be deemed a violation of this Order.

27. Nothing herein limits or otherwise affects any right of entry held by the United States pursuant to applicable laws, regulations, or permits.

28. This Order shall apply to and be binding upon Respondent and its successors, each agent of Respondent, and all other persons and entities which are under the direct or indirect control of Respondent, including any and all lessees of Respondent.

29. In the event of any conveyance by Respondent, or by Respondent's agents, successors, and assigns, of an interest in the Property, Respondent or Respondent's agents, successors, and assigns, shall convey the interest in a manner which insures continued access to the Property by EPA and its representatives for the purpose of carrying out the activities described above pursuant to this Order. Any such conveyance shall restrict the use of the Property so that the use will not interfere with activities undertaken, or to be undertaken, by EPA and its representatives. Respondent, or Respondent's agents, successors, and assigns shall notify EPA in writing at least thirty days prior to the conveyance of any interest in the Property and shall, at least thirty days prior to the transfer, notify the other parties involved in the conveyance of the provisions of this Order and shall provide a copy of this Order to each such party.

VI. ENFORCEMENT

30. Compliance with this Order shall be enforceable pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5). A court may impose a civil penalty on Respondent of up to \$53,907 per violation per day that Respondent unreasonably fails to comply with this Order, as provided in Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), and the Debt Collection and Improvement Act of 1996 (*See Civil Monetary Penalty Inflation Adjustment Rule*, 81 Fed. Reg. 43091 [July 1, 2016]). Nothing herein shall preclude EPA from taking any additional enforcement actions, and/or other actions it may deem necessary for any purpose, including the prevention or abatement of a threat to the public health, welfare, or the environment arising from conditions at the Property, and recovery of the costs thereof.

31. Nothing in this Order constitutes a waiver, bar, release, or satisfaction of or a defense to any cause of action which EPA has now or may have in the future against Respondent or against any entity which is not a party to this Order.

32. Nothing in this Order shall affect in any manner the right of EPA to issue any other orders to or take any other administrative or civil action against Respondent or any other parties under CERCLA which relate to the Property, the Site, or any other site.

33. Nothing in this Order constitutes a decision on preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

VII. ADMINISTRATIVE RECORD

34. EPA has established an administrative record which contains the documents that form the basis for the issuance of this Order. It is available for review by appointment on weekdays between the hours of 8:00 am and 4:00 pm at the EPA offices at 290 Broadway, 17th Floor, New York, New York 10007. To review the administrative record, please contact Walter Sainsbury at 212-637-3177 or sainsbury.walter@epa.gov to make an appointment.

VIII. OPPORTUNITY TO CONFER

35. Within five business days after receipt of this Order by Respondent, Respondent may request a conference with EPA, to be held no later than five business days after Respondent's request, to confer on any matter pertinent to this Order, including its applicability, the factual findings and the determinations and conclusions upon which it is based, or any other relevant and material issues or contentions which Respondent may have regarding this Order. Respondent may appear in person or by an attorney or other representative at the conference. Respondent may also submit written comments or statements of position on any matter pertinent to this Order no later than the time of the conference, or at least two business days before the effective date of this Order if Respondent does not request a conference. EPA will deem Respondent to have waived its right to the conference or to submit written comments if it fails to request the conference or submit comments within the applicable time period. Any request for a conference or submission of written comments or statements should be submitted to:

Walter S. M. Sainsbury
Assistant Regional Counsel
New York/Caribbean Superfund Branch
Office of Regional Counsel, EPA Region 2
290 Broadway, 17th Floor
New York, NY 10007
Tel: 212-637-3177
Fax: 212-637-3104
sainsbury.walter@epa.gov

IX. EFFECTIVE DATE; COMPUTATION OF TIME

36. Because of the immediate need to conduct the activities described above, this Order shall be effective seven business days after the later of its receipt by Respondent or Respondent's designated representative unless a conference is timely requested as provided above. If a conference is timely requested, then after the conference, if EPA determines that no modification to the Order is necessary, the Order shall become effective immediately upon notification by EPA of such determination. If modification of the Order is determined by EPA to be necessary, the Order shall become effective upon notification by EPA of such modification. Any EPA notification under this paragraph may, at EPA's discretion, be provided to Respondent by facsimile, electronic mail, or oral communication; provided that if EPA does use such a form of notification, it will also confirm such notification by certified or express mail to Respondent or its legal counsel. Any amendment or modification of this Order by EPA shall be made or confirmed in writing.

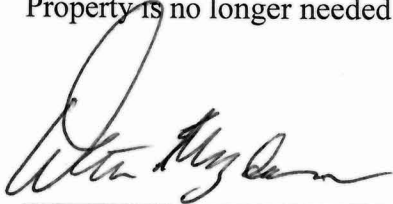
37. For purposes of this Order, the term "day" shall mean a calendar day unless expressly stated to be a business day. The term "business day" shall mean a day other than a Saturday, Sunday, or federal legal holiday. When computing any period of time under this Order, if the last day would fall on a Saturday, Sunday, or federal legal holiday, the period shall run until the next business day.

X. NOTICE OF INTENT TO COMPLY

38. Within three business days of the effective date of this Order, Respondent shall notify EPA in writing whether Respondent will comply with the terms of this Order. Such written notice shall be sent to Walter Sainsbury, Assistant Regional Counsel, at the address noted in Paragraph 35, above. Respondent's failure to notify EPA of its unconditional intent to comply with this Order fully by the time this Order becomes effective shall be construed as a denial of EPA's request for access, and it will be treated as a violation of this Order as of the effective date.

XI. TERMINATION

39. This Order shall remain in effect until the EPA Director of the Emergency and Remedial Response Division or his/her designee notifies Respondent in writing that access to the Property is no longer needed for the purposes set forth in Paragraph 16.



Walter Mugdan, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency - Region 2

Date: Nov. 9, 2016

Exhibit A

Beechnut Nutrition Corp. Superfund Site

Canajoharie, NY

